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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

TACHON INC./SUBLETT,	)	
	)	PCHB NO. 93-232
Appellant,	)	
	)	
v.	)	FINAL FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
PUGET SOUND AIR	)	AND ORDER
POLLUTION CONTROL	)	
AGENCY,	)	
	)	
Respondent.	)	
_____		

This case came before the Pollution Control Hearings Board ("Board") on an appeal filed on August 18, 1993, by Tachon Inc./Sublett ("Tachon"), of a Notice and Order of Civil Penalty issued by Puget Sound Air Pollution Control Authority ("PSAPCA") on August 10, 1993.

A hearing was held on May 11, 1994, in Lacey, Washington. Present for the Board were Richard C. Kelley, Vice Chairman, who presided, Robert V. Jensen, Chairman, and James A. Tupper, Jr. Tachon was represented by Michael T. Zoretic, attorney, of Barokas and Martin, Seattle. PSAPCA was represented by Laurie Halvorson, General Counsel. The proceedings were recorded by Betty J. Koharski, of Gene Barker and Associates, Olympia.

Witnesses were sworn and testified. Exhibits were introduced and examined. The Board considered the arguments of the parties. Based on all of the foregoing, the Board makes the following

1  
2 FINDINGS OF FACT

3 I.

4 On April 29, 1993, Tachon submitted to PSAPCA an "Application to Perform and  
5 Asbestos Project" at Building 9630, Fort Lewis. Tachon was subcontractor to Northern  
6 Pacific Contractors, Inc.

7 II.

8 On May 13, 1993, at 2:10 p.m., PSAPCA Inspector Max Scarberry, accompanied by  
9 PSAPCA Inspector Vic Aguilar, visited Fort Lewis to inspect the Tachon work. The job  
10 consisted of removing exterior asbestos-containing cement board around a window.

11 III.

12 A Tachon employee had completed the removal, wetted and double-bagged the asbestos  
13 material, labeled them, and put the bags on the roof. Tachon had previously agreed with the  
14 Corps of Engineers employee supervising the project for the Army that Tachon would wait  
15 until after the Army employees in the building had left for the day before moving the bags  
16 from the roof to the truck for disposal.

17 IV.

18 Also present on the roof were fragments of asbestos-containing cement material which  
19 were not generated by Tachon or this project, but left over undisposed from previous work.  
20 Tachon had volunteered to dispose of this material when their bags were removed for disposal.

21 V.

22 After moving the bags to the roof, the Tachon employee closed the hatch door to the  
23 roof, put a red tape across the hatch to secure the site, posted a warning sign inside the hatch,  
24 and left to go to another jobsite, planning to return after 4:00 p.m. to dispose of the material.  
25 The hatch was inside the building's mechanical room, separated by a second door from the  
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1  
2 general office area. The Tachon employee did not lock the hatch because it was needed for a  
3 fire exit.

4 VI.

5 Sometime after the Tachon employee left the site, an employee of the general  
6 contractor, who was not certified as an asbestos worker, came into the mechanical room,  
7 opened the taped hatch, exited onto the roof, and proceeded to work on replacing a window  
8 within 2 or 3 feet of the asbestos bags.

9 VII.

10 Tachon had agreed with the general contractor, before beginning the work, that no  
11 employees of the general contractor were to go into the asbestos area until Tachon gave the  
12 general contractor a letter saying that all asbestos work had been completed. Tachon had not  
13 given such a letter yet.

14 VIII.

15 Inspector Scarberry issued Notice of Violation No. 29489 to Tachon and the general  
16 contractor for violation of PSAPCA Regulation III, Section 4.02(a)(4)(c), failure to contain  
17 asbestos-containing material in a controlled area until transported to a waste disposal site.

18 IX.

19 On August 10, 1993, PSAPCA issued to Tachon and Northern Pacific Contractors,  
20 Inc., Civil Penalty No. 7848, in the amount of \$2,000.

21 X.

22 Tachon timely appealed the Notice of Penalty to the Board.

23 XI.

24 Any conclusion of law deemed to be a finding of fact is adopted as such.

25 Based on the above findings, the Board makes these

1  
2 CONCLUSIONS OF LAW

3 I.

4 The Board has jurisdiction in this matter under RCW 43.21B and RCW 70.94.

5 II.

6 PSAPCA Regulation III is a validly adopted regulation of an activated air pollution  
7 control authority under the Washington Clean Air Act, RCW 70.94.

8 III.

9 Tachon was cited for violating PSAPCA Regulation III, Section 4.02(a)(4)(C). This  
10 was a scrivener's error, and the violation was in fact of Section 4.04(a)(4)(C), which requires  
11 asbestos-containing materials be

12 *(C) Contained in a controlled area at all times until transported to a waste*  
13 *disposal site;*

14 The Notice and Order of Civil Penalty issued to Tachon described the violation as

15 *Failure to contain in a controlled area at all times until transported to a*  
16 *waste disposal site, all asbestos-containing material that has been removed or*  
17 *may have fallen off components during the course of an asbestos project.*

18 We conclude that the text statement of the violation cited was unambiguous, and  
19 therefore the erroneous section citation created no prejudice for appellant.

20 IV.

21 The relevant part of Regulation III, Section 4.02(j) defines "controlled area" thus:

22 *Controlled area shall mean an area to which only certified asbestos*  
23 *workers, or other persons authorized by Regulation I or the Washington*  
24 *Industrial Safety and Health Act, have access.*

25 PSAPCA's regulation is wise in not attempting to define "controlled area" any more  
26 precisely. What constitutes a controlled area will necessarily vary from site to site, depending  
27 on the circumstances and physical structures present. We conclude that a "controlled area" is

1  
2 dependent on the circumstances and physical structures present, and that a "controlled area" is  
3 one in which the asbestos contractor has taken all reasonable actions designed to prevent the  
4 intrusion into the asbestos area of members of the general public. "Reasonable actions" in the  
5 present case do not include locking a fire exit onto a roof.

6 V.

7 The reasonable actions Tachon took to prevent the general public from coming into  
8 contact with the asbestos included: closing the hatch, posting a warning sign, sealing the hatch  
9 with warning tape, and agreeing in advance with the general contractor not to allow the  
10 general's employees into the area until Tachon notified the general of completion of the  
11 asbestos work. These, in the context of work being performed on a roof accessed through a  
12 mechanical room, constitute the reasonable actions which define a controlled area.

3 VI.

14 Any finding of fact deemed to be a conclusion of law is adopted as such.

15 Based on the above findings of fact and conclusions of law, the Board enters this

17 ORDER

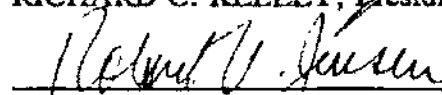
18 1. The appeal of Tachon Inc./Sublett is granted.

19 2. PSAPCA is instructed to void Notice and Order of Civil Penalty No. 7848, and  
20 delete all references to this penalty and alleged violation from its files.  
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2 DONE this 20th day of May, 1994, in Lacey, Washington.  
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4 POLLUTION CONTROL HEARINGS BOARD

5   
6 RICHARD C. KELLEY, Presiding

7   
8 ROBERT V. JENSEN, Chairman

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10 JAMES A. TUPPER, JR., Member

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